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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

9 ROBIN FONTAINE SUDDUTH, )

10 Petitioner, )

11 v. )

12 UNITED STATES OF AMERICA, )

13 Respondent. )

Case No. C05-480TSZ  
(CR96-418TSZ)

REPORT AND RECOMMENDATION

14  
15 INTRODUCTION AND SUMMARY CONCLUSION

16 Petitioner Robin Sudduth is a federal prisoner who is currently incarcerated at the Federal  
17 Prison Camp at Sheridan, Oregon. He has submitted to this Court for consideration a petition for  
18 writ of error *audita querela* under the All Writs Act, 28 U.S.C. § 1651. The government has filed  
19 a response to the petition and petitioner has filed a reply brief in support of his petition. Petitioner  
20 has also filed a motion for appointment of counsel. Following a careful review of the record, this  
21 Court concludes that petitioner's petition for writ of error *audita querela*, and his motion for  
22 appointment of counsel, should be denied.

23 FACTUAL/PROCEDURAL HISTORY

24 On October 15, 1996, petitioner was convicted, following a jury trial, on one of count of  
25 conspiracy to distribute cocaine and one count of possession of cocaine with intent to distribute.

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1 (CR96-418Z, Dkt. No. 95.) On January 17, 1997, petitioner was sentenced to a term of 168 months  
2 confinement. (CR96-418Z, Dkt. No. 160.) Petitioner appealed his convictions to the Ninth Circuit  
3 Court of Appeals. (See CR96-418Z, Dkt. No. 203.) On February 18, 1998, in an unpublished  
4 opinion, the Court of Appeals affirmed petitioner's convictions. *United States v. Sudduth*, 139 F.3d  
5 909 (9<sup>th</sup> Cir. 1998).

6 On February 4, 1999, petitioner filed a motion under 28 U.S.C. § 2255 to vacate, set aside,  
7 or correct his sentence. (C99-160Z, Dkt. No. 1.) Petitioner's § 2255 motion was denied on  
8 November 3, 1999. (*Id.*, Dkt. No. 22.) Petitioner sought to appeal the denial of his § 2255 motion,  
9 but he was denied a certificate of appealability. (*Id.*, Dkt. Nos. 23-25.)

10 On March 7, 2005, petitioner presented to the court for filing a petition for writ of error *audita*  
11 *querela*. Petitioner asserts in the instant petition that he is entitled to relief from the judgment imposed  
12 by this court under the United States Supreme Court's recent decision in *United States v. Booker*, 125  
13 S. Ct. 738 (2005).

## 14 DISCUSSION

### 15 Availability of Writ of *Audita Querela*

16 The initial question for this Court to consider is whether the writ of *audita querela* provides  
17 petitioner with an avenue of relief. Petitioner argues in his petition, and in his supporting documents,  
18 that a motion under § 2255 will not afford him adequate relief and that a petition for writ of error  
19 *audita querela* is therefore the only avenue available to him to attack his sentence. (Dkt. Nos. 1-2.)  
20 Respondent argues that the writ of *audita querela* does not provide a basis for relief because the  
21 review petitioner seeks by way of the writ is the same review he could obtain under § 2255, if such  
22 review were still available to him. (See Dkt. No. 10.) Respondent argues in the alternative that the  
23 petition should be characterized as a motion under § 2255 motion and that it should be transferred to  
24 the Ninth Circuit Court of Appeals as a successive motion.

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1 At common law, the writ of error *audita querela* was only available to a judgment debtor who  
2 sought relief against a judgment or execution when some legal defense or discharge arose after the  
3 issuance of the judgment. *Doe v. Immigration and Naturalization Service*, 120 F.3d 200, 202 (9th  
4 Cir. 1997) (internal citations omitted); *see also* Wright and Miller, *Federal Practice and Procedure*,  
5 §2867 at 235 (1973). Hence, the writ of error *audita querela* could be used to attack a judgment that  
6 was correct when issued, but later rendered infirm due to some legal defect. *Doe*, 120 F.3d at 203 n.  
7 4 (internal citations omitted).

8 In 1946, amendments to Federal Rule of Civil Procedure 60(b) expressly abolished all of the  
9 common law writs for civil cases, including *audita querela*. Fed. R. Civ. P. 60(b); *U.S. v. Beggerly*,  
10 524 U.S. 38 44-45 (1998); *Doe*, 120 F.3d at 202. The Supreme Court has nevertheless held that  
11 *audita querela*, and the other common law writs, survive as a way to collaterally attack criminal  
12 sentences in very narrow circumstances.<sup>1</sup> *U.S. v. Morgan*, 346 U.S. 502, 510-11 (1954); *U.S. v.*  
13 *Gowell*, 374 F.3d 790, 795 n. 3 (9th Cir. 2003). *Audita querela* and the other writs are now available  
14 “only to the extent that they fill “gaps” in the current systems of post-conviction relief.” *U.S. v.*  
15 *Valdez-Pacheco*, 237 F.3d 1077, 1079-80 (9th Cir. 2000).

16 Federal prisoners may not, however, employ the writ of *audita querela* to challenge their  
17 conviction or sentence when that challenge is cognizable as a § 2255 motion. *Valdez-Pacheco*, 237  
18 F.3d at 1080; *see also U.S. v. Johnson*, 962 F.2d 579, 582 (7th Cir. 1992), *U.S. v. Banda*, 1F.3d 354,  
19 356 (5th Cir. 1993). In such cases, there is simply no “gap” in the post-conviction remedies that  
20 needs to be filled. *Valdez Pacheco*, 237 F.3d at 1080. In *Valdez-Pacheco*, the Ninth Circuit  
21 specifically held that *audita querela* is not available to federal prisoners merely because the  
22 Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) prevents them from filing of

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24 <sup>1</sup>Some courts have challenged whether *audita querela* survives at all. *See Doe*, 120 F.3d at 204  
25 & n. 5 (collecting cases).

1 second or successive § 2255 motion. *Valdez-Pacheco*, 237 F.3d at 1080. The Court made clear that  
2 “[a] prisoner may not circumvent valid congressional limitations on collateral attacks by asserting  
3 that those very limitations create a gap in the post-conviction remedies that must be filled by the  
4 common law writs.” *Id.* (internal citations omitted).

5 Here, petitioner’s challenge is plainly the type of challenge cognizable in a § 2255 motion.  
6 Indeed, the face of the petition indicates that petitioner seeks relief from his federal court sentence  
7 under *Booker*. (Dkt. No. 1.) This is precisely what a § 2255 motion is designed to do. The mere  
8 fact that petitioner has labeled this a petition for writ of error *audita querela* does not change its  
9 actual substance. Petitioner’s claims should be brought as a § 2255 motion. The fact that AEDPA  
10 may bar petitioner from filing a second or successive § 2255 petition does not render *audita querela*  
11 the proper vehicle for his claims. The petition should therefore be denied. Because this Court  
12 concludes that a petition for writ of error *audita querela* is not the proper vehicle for petitioner to  
13 raise his claims, it need not consider his other arguments. *See Valdez-Pacheco*, 237 F.3d at 1080.

#### 14 Motion for Appointment of Counsel

15 As noted above, petitioner has filed a motion for appointment of counsel in this case. Because  
16 this Court concludes that petitioner may not proceed with respect to his petition for writ of error  
17 *audita querela*, petitioner’s motion for appointment of counsel is moot.

#### 18 CONCLUSION

19 Because petitioner seeks relief from his federal court sentence, his claims could be brought in  
20 a § 2255 motion, if such review were still available to him. As a result, a petition for a writ of error  
21 *audita querela* is not the proper vehicle for his claims. This Court therefore recommends that the  
22 petition be denied and that this action be dismissed. This Court further recommends that petitioner’s  
23 motion for appointment of counsel be denied. A proposed order accompanies this Report and  
24 Recommendation.

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1 DATED this 25th day of July, 2005.

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4 JAMES P. DONOHUE  
5 United States Magistrate Judge  
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